

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

IN RE ALICE STEDMAN 1989 TRUST, DATED SEPTEMBER 26, 1989,
RESTATEMENT DATED FEBRUARY 23, 2013¹

312-2014-EQ-00108

ORDER ON THE SPECIAL TRUSTEE'S VERIFIED MOTION FOR APPROVAL OF
ATTORNEY'S FEES DATED MAY 8, 2017

Presently addressed by the Court is the third of four expected rulings on attorney fee related issues, see Orders dated April 24, 2017 ("April 24, 2017 Orders")(Index #126); Order on Petitioner's Request for Surcharge Against Respondent For Fees and Costs of Special Trustee Previously Paid by Trust dated June 1, 2017 (the "June 1, 2017 Order")(Index #136),² arising from litigation concerning Petitioner Stanley Stedman's ("Stanley") and Petitioner Tammy Soper's ("Tammy")(collectively, the "Petitioners") challenge to the validity of the 2013 Restatement of the Alice Stedman 1989 Trust, see October 27th Order (Index #40), continuing disputes between the

¹ The Court observes that since its Order granting the Petitioners' *Petition for Declaratory Judgment and to Impose Constructive Trust and Request for Injunctive Relief* (the "October 27th Order")(Index #40) was affirmed on appeal, see In re Alice Stedman 1989 Trust 2013 Restatement, No. 2015-0717 (N.H. Nov. 10, 2016), the operative trust document is the Alice Stedman 1989 Trust, as later amended (the "Alice Trust") and split into two trusts, the Paragraph 1 Alice Trust and Paragraph 3 Alice Trust. See Index ##69 & 75. The Court has not modified the caption for purposes of consistency of the record only, and does not mean to imply that it views the 2013 Restatement as having continuing validity.

² The Court anticipates issuing a fourth order addressing the Petitioners' *Notice of Attorney's Fees and Costs Pursuant to April 19, 2017 Order*, see Index #128, and objections and responses thereto. See Index ##132; 135.

Petitioners and the Respondent, Claire Donahue ("Respondent"), former co-trustee of the Alice Trust³ after the 2013 Restatement was invalidated, see id., and the activities of the Special Trustee, Cynthia L. Worthen, since her appointment in January 2016. See Index ## 48, 51, 55-56.

In its two prior rulings, the Court determined, inter alia, that: (1) the Respondent must repay the Alice Trust for attorney's fees associated with her failed defense of the 2013 Restatement, see April 24, 2017 Orders at 3-5 (Index #126); (2) the Respondent must reimburse the Petitioners for "attorney's fees and costs incurred by them in the litigation to invalidate the 2013 Restatement," id. at 4; (3) the Respondent would not be surcharged for failing to collect on a \$35,000 loan from Alice Stedman to Michael and Lisa Donahue, see id. at 3; *Petition for Surcharge* (Index #61); (4) the Respondent must repay the Alice Trust \$3,749.00 of the \$64,825.42 previously paid the Special Trustee for services rendered and expenses incurred between February 2, 2015 through June 30, 2016 associated with the "Cota Litigation", see June 1, 2017 Order at 2, 8 (Index #136); and (5) the Petitioners would not be required to repay the Alice Trust for fees incurred by the Special Trustee associated with their unsuccessful *Petition for Surcharge*. See id. at 4-5. It incorporates by reference all findings and rulings in its April 24th Order, see Index # 126, and it's June 1st Order, see Index #136. It also incorporates by reference all prior orders, including, but not limited to, its Order dated February 16, 2017, see Index #119; its October 27th Order, see Index #40; its June 1st Order, see Index #136; its April 24, 2017 Order, see Index #126; and its Order dated April 8, 2016. See Index #77 (concerning the Coda Litigation).

³ She was also the named trustee on the 2013 Restatement.

Presently before the Court is the Special Trustee's *Verified Motion for Approval of Attorney's Fees*, see Index #129, seeking authorization to collect from the "Paragraph 1 Alice Trust"⁴ \$79,215.50 in fees incurred between July 1, 2016 and March 31, 2017. The Petitioners filed a *Response* in which they do not object to the amount of fees charged, but request that "said fees be subject to the same allocation to Claire Donahue" as the Court determined in its prior orders.⁵ *Petitioners' Response* ¶ 3 (Index #133). The Respondent requests grant of the Special Trustee's *Motion*, but "[i]n the event that the Court is inclined to allocate the Special Trustee's fees among the parties" sums associated with their unsuccessful *Petition for Surcharge* be reimbursed to the Paragraph 1 Alice Trust by the Petitioners. *Respondent's Response Prayer C* (Index #134). The Court **GRANTS** the *Verified Motion for Approval of Attorney's Fees* for the reasons that follow. It notes that while the Petitioners and Respondent do not challenge the reasonableness of the fees, see *Petitioner's Response* (Index #133); *Respondent's Response* (Index #134), it has an independent duty to review the Special Trustee's fees for reasonableness nonetheless. See Cir. Ct.- Prob. Div. R. 88. As such, it deems the reasonable fees payable by the Paragraph 1 Alice Trust to be **\$79,215.50**.

I. Fee Allocation

In her *Verified Motion for Approval of Attorney's Fees*, the Special Trustee seeks approval of payment by the Paragraph 1 Alice Trust for \$79,215.50 in fees and disbursements advanced, of which she attributes \$32,098.00 in fees to litigation

⁴ Following her appointment in January 2016, the Special Trustee requested, and the Court approved, division of the Alice Trust into the "Paragraph 1 Alice Trust" and "Paragraph 3 Alice Trust." See Index ##69 & 75. For simplicity's sake, the Court will refer to either or both as the "Alice Trust" unless necessary for clarity of adjudication.

⁵ The Court observes that although the Respondent has appealed its April 24th Order to the Supreme Court, neither party filed a *Motion for Reconsideration* of its June 1st Order and it has yet to receive notice of any appeal of that order by any party.

generated expenses and \$46,599.00 to administrative tasks. The \$518.50 difference between the total fees and disbursements advanced and the Special Trustee's allocation of fees alone is unallocated to either litigation or administration. That said, the Court deduces from the activity recitals in the April 25, 2017 dated billing invoice for the same dates reported for the \$1.50 advanced disbursement for tolls related to administrative matters, while the \$60.09 incurred for travel was pertained to attendance at a status conference ordered by the Court following the New Hampshire Supreme Court's affirmance of this Court's October 27, 2015 Order on Petition for Declaratory Judgment and to Impose Constructive Trust and Request for Injunctive Relief (Index #40). See In re Alice Stedman 1989 Trust Restatement, No. 2015-0717(N.H. Nov. 10, 2016) (unpublished). The invoice bears no activity entries matching the dates for the advanced \$456.91 filing fee, Federal Express or Westlaw disbursements casting light on their nature, purpose or reasonableness.⁶

The Court interprets the Petitioners' rather broad objection as asserting their prior claim that the Respondent should be found personally responsible pursuant to RSA 564-B:10-1004⁷ for all Special Trustee fees since her "actions necessitated the need for a court appointed Special Trustee, and thus justice and equity require that the Special Trustee fees and expenses be assessed against her." June 1, 2017 Order at 3 (ellipses and brackets omitted)(Index #136). The Court, however, rejected that proffer, noting that it would amount to invocation of "a per se rule that it has previously declined to do."

⁶ Because, as will be next discussed and addressed, the Court has determined that the Respondent will not be charged with the duty to personally pay the subject fees and costs of the Special Trustee, whether the unallocated advanced disbursements relate to matters of litigation or administration is rendered irrelevant and, accordingly, moot.

⁷ This statute provides: "[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

Id. at 7; see generally, Shelton v. Tamposi, 164 N.H. 490, 502 (2013)(contours of RSA 564-B:10-1004). Instead, it concluded that justice and equity required a surcharge imposed on the Respondent only where costs “arise exclusively from [her] wrong-doing” and that she should not be held responsible for “additional ensuing disputes between the irretrievably estranged siblings” following resolution of the initial litigation over the validity or invalidity of the 2013 Restatement. Id.

Here, the Petitioners make no arguments specifically alleging that certain fees charged by the Special Trustee after July 1, 2016 arose exclusively from the wrongful undue influence exerted by the Respondent that inspired the 2013 Restatement,⁸ rather than an extension of unrelated, if tangentially associated, litigation between estranged siblings. A review of invoices identified as pertaining to litigation does not readily reveal or suggest that the subject fees should be solely the responsibility of the Respondent. Instead, as the Court observed in its June 1, 2017 Order, where the “litigation expenses at issue . . . pertain to a variety of post-trial litigation matters that are not so easily determined to arise from the acts of one party or another,” it will not authorize a blanket shift of Special Trustee fees to the Respondent personally pursuant to RSA 564-B:10-1004. Id. at 6-7. Similarly, a review of the fees segregated as “administrative” do not reveal or suggest that any can easily be identified as resulting from wrong-doing or other acts that would justify exercise of the Court’s equitable authority under RSA 564-B:10-1004 to impose them on the Respondent personally.⁹

⁸ The Court notes that she has previously been charged for litigation expenses associated with the Cota Litigation, see Index #136, and for inappropriate uncooperativeness in providing trust financial information to the Special Trustee and Petitioners as beneficiaries. See Order dated July 18, 2016 (Index #101).

⁹ The Respondent asserts that “at least \$13,636.50 should be personally paid by the petitioners due to their disproportionate and unsuccessful Petition for Surcharge.” *Respondent’s Response* at 4 (Index #134). However, she apparently only requests such relief “[i]n the event that the Court is inclined to

II. Reasonableness

Although the parties do not challenge the amount of fees sought by the Special Trustee, it is the Court's responsibility to review the invoices to determine whether they are reasonable. Here, the Special Trustee seeks payment for services provided by herself, a partner in her firm specializing in litigation, an associate and paralegal from July 1, 2016 through March 31, 2017. See *Verified Motion for Approval of Attorney's Fees* (Index #129).

As was stated earlier, any award of fees for a fiduciary and her counsel must be reasonable. The Court now turns to the appropriate manner of determining the reasonableness of the fees and advanced disbursements. RSA 564-B:8-805 provides that "[i]n administering, investing, and managing the trust and distributing the trust property, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee." Id. Circuit Court – Probate Division Rule 88 provides:

Fees and expenses of Fiduciaries and Attorneys shall be subject to the approval of the Court. In all cases, fees and expenses shall be reasonable for the work, responsibility, and risk. Factors used to determine the reasonableness of a fee may include the time and labor required, the size of the estate, the requisite skill, the customary fee, a fee agreement, the results obtained, time limitations, and the length of the professional relationship.

Cf. In re Estate of Rolfe, 136 N.H. 294, 298 (1992). The Court notes that the above quoted list, grounded in the applicable New Hampshire Rules of Professional Conduct,

allocate the Special Trustee's fees among the parties." Id. Prayer C. Given that there is no "allocation" to the Respondent, by her own request, none should be "allocated" to the Petitioners. In any event, the Court also adopts the reasoning in its June 1, 2017 Order declining to impose the fees associated with the *Petition for Surcharge* on the Petitioners and declines to do so here. See id. at 4-5.

see N.H. R. Prof. Conduct 1.5(a); see generally, In re Estate of Rolfe, 136 N.H. at 299, is not a comprehensive one, and therefore courts look to not only those factors, but “any other appropriate circumstances” to determine the appropriate fee to be awarded. Id.

The Court’s inquiry is governed by a rule of reasonableness, see RSA 564-B: 8-805; N.H. R. Prof. Conduct 1.5; cf. Wendell v. French, 19 N.H. 205, 209-10 (1848)(attorney for estate), and the Court has a duty to pass on all attorneys’ fees sought to be recovered from a trust in litigation before it. Cf. Terzis v. Estate of Whalen, 126 N.H. 88, 94 (1985) (“Courts have a stake in attorney’s fees contracts; the fairness of the terms reflects directly on the court and its bar.”(quotations omitted)). Thus, it will also look for guidance in fiduciary fee decisions from other jurisdictions that apply factors, grounded in the attorney conduct rules that are substantially similar to New Hampshire. Compare In re Estate of Rolfe, 136 N.H. at 299 (factors to consider) with In re Estate of King, 920 N.E.2d 820, 829 (Mass. 2010)(same).

Here the Court concludes that the hourly rates charged by the Special Trustee (\$310), her experienced litigation partner (\$380), associate (\$200), and experienced paralegal (\$195)¹⁰ are in line with customary fees charged by attorneys and staff in this area. It also observes that the Special Trustee endeavored to task her associate and paralegal with administrative tasks in order to keep overall costs down.

The Court observes, however, that total fees of \$79,215.00 for one year’s work are not within a normal expected range of fees for a trust this size. Over the over three-and-one-half years since transfer to the Trust Docket, it has come to recognize that not

¹⁰ The Court recognized that the Special Trustee’s paralegal, Ms. Swinton has over 27 years of experience as a paralegal. It is reminded of the oft stated observation that experienced and “well-educated paralegals are worth their weight in gold.” Deborah M. House, 75 Tips for Saving Money in-House ¶44 Association of Corporate Counsel Docket, (March 2009).

only has this matter been heavily contested, but given Alice's casual bookkeeping and business management, and the Petitioners' distrust of the Respondent, the Special Trustee was involved in both court matters and business management to an unusually large degree.

In light of these challenges, it strikes the Court as reasonable for counsel and staff personnel of diverse legal disciplines and levels of expertise or experience to be drawn together occasionally to confer in order to address the unique, sometimes overlapping, challenges as they arise or are presented.

While it is somewhat assuaged by the lack of challenge or objection proffered by either the Petitioners or the Respondent, the Court still is concerned with billing entries of multiple intra-office conferences and communications, as well as duplicative activities, engaged in and charged among attorneys and paralegals assigned to work in both the trust administration and litigation matters. As example, but not intended as a complete recitation of duplicative billing, were litigation entries for 11/14/16-11/15/16, 3/02/17 and 3/07/17, as well as administrative entries for 7/06/16, 7/08/16, 7/22/16, 7/26/16, 2/17/17 and 2/27/17. See generally, In re Estate of King, 920 N.E.2d at 830. The effect, in some instances, depending on the number and hourly rate charged by the participants, is to raise the financial stake of the Alice Trust from as little as \$195.00 to as much as \$905.00 an hour for the activity or service provided. It strikes the Court that a fairer and more reasonable way of balancing the need for drawing professionals and supportive paraprofessionals together to meet, communicate or otherwise collaborate in advancing their client's cause in the matter to be addressed is to, at the very least, average their individual billing rates in attaining one hourly rate to bill for the service or

activity of concern and in avoidance of duplicative, even if shared, work and the resulting cumulative expense to the client. In so stating, it should not go unsaid that the Court appreciates that there are also many entries in both the arena of litigation and administration involving intra-office conferences and communications that reflect charges by only one attorney or paralegal. The Special Trustee is requested to be mindful of the foregoing principle in relation to future submissions including requests for approval of fees and expenses concerning services and activities of a nature undertaken by way of shared or collaborative participation of multiple professionals or paraprofessionals of her law firm.

RECOMMENDED:

Dated: 6.28.17

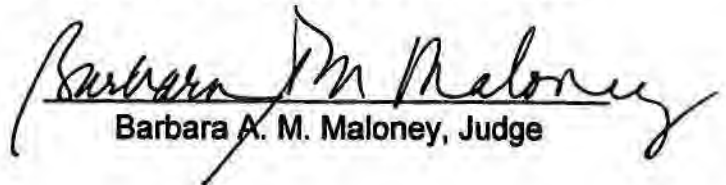


Gary R. Cassavechia, Retired Judge
and current Judicial Referee

SO ORDERED.

I hereby certify that I have read the foregoing recommendation(s) and agree that, to the extent the Judicial Referee has made factual findings, he has applied the correct legal standard to the facts determined by him.

Dated: 6.28.2017



Barbara A. M. Maloney, Judge